MIAMI BEACH CITY COMMISSION

APPEAL OF DESIGN REVIEW BOARD
ORDER NO. DRB 18-0226

CONTINUUM ON SOUTH BEACH,
SOUTH TOWER CONDOMINIUM,
100 SOUTH POINTE DRIVE,
MIAMI BEACH, FL 33139

CONTINUUM ON SOUTH BEACH,
THE SOUTH TOWER CONDOMINIUM
ASSOCIATION, INC.,

Petitioner,

vs.

CITY OF MIAMI BEACH DESIGN REVIEW
BOARD,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

AKERMAN LLP

NEISEN O. KASDIN
Florida Bar No. 302783
neisen.kasdin@akerman.com
JONI ARMSTRONG COFFEY
Florida Bar No. 281646
joni.armstrong.coffey@akerman.com
KRISTOFER D. MACHADO
Florida Bar No. 102731
kristofer.machado@akerman.com
98 SE 7th Street, Suite 1100
Miami, Florida 33131
Phone: 305.374.5600
Fax: 305.374.5095

Counsel for Petitioner

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INTRODUCTION

To date, more than 120 metal panels have detached and fallen from the Continuum South Tower's balcony railings, tumbling to the ground below, and 164 have become loose over time. *App., Ex. B, p. 1, Ex. J, p. 5.* The panels weigh more than five pounds individually and can weigh sixty pounds or more when joined with broken shards of the tempered railing glass to which they were taped. *App., Ex. J, pp. 6-7, 14, 35-36.*

The Association has established, through competent substantial evidence, that the defective metal panels are dangerous and must be removed, and that there is no safe and effective way to retrofit the building's existing tempered glass railings to mimic the faint horizontal band the defective panels evoke from afar. *Pet'r Brief, pp. 5-6.*[1] The Association has thus shown that there is no way to ensure the "safety . . . of the project in relation to the site, adjacent structures and [the] surrounding community," consistent with the City's Design Review Criteria, absent removal of the defective panels.

To reach a contrary decision, the DRB—by law—must rely on competent substantial evidence that rebuts the Association's expert testimony. *Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986) (once an applicant shows that its application satisfies the relevant criteria, the burden shifts to the opposing party "to demonstrate, by competent substantial evidence presented at the hearing and made a part of the record, that the [application] did not meet such standards[.]") (internal quotations omitted). The DRB's Order, however, is predicated entirely on the unsupported presumption that the existing balcony railings can be retrofitted safely to include horizontal banding. There is simply no record evidence to support this conclusion.

The City Attorney attempts to salvage the DRB's erroneous decision by turning to non-expert testimony and a defective Staff Report, by misunderstanding the factual background, and by attempting to assign the DRB's regulatory responsibility on safety to other boards and officials. None of the City Attorney's arguments refutes the fact that the DRB misapplied the law, did not render a decision supported by legally sufficient evidence, and ultimately required a dangerous condition to remain, to the detriment of residents, visitors, and the community at large.

ARGUMENT

A. By Refusing to Approve the Association's Application, the DRB *Necessarily* Required That the Unsafe Metal Panels Remain.

The City Attorney contends that the DRB, in denying the Association's application, did not reject the Association's safety concerns, they simply rejected the Association's design modification request. *Resp. Br., pp. 1 & 3.* This ignores that the Association is seeking to remove the defective panels not because of a design preference, but precisely because there is no other reasonable alternative to ensure safety.

The record is clear that the defective metal panels are dangerous and pose an obvious safety hazard to residents, visitors, and the surrounding community. *App., Ex. J, p. 14 & 35.* The record

[1] References to the Association's Initial Brief are noted as "Pet'r Br." References to the City Attorney's Response Brief are noted as "Resp. Br." All other capitalized terms are as defined in the Initial Brief.

is likewise clear that there is no safe and effective way of retrofitting the building's existing tempered glass railings to mimic the faint horizontal band the metal panels evoke from afar. *App., Ex. J, pp. 12-39.* Thus, by refusing to approve the Association's application, the DRB *necessarily* required that the unsafe metal panels remain, contrary to the DRB's obligation to ensure safety.

At the hearing, the Association's glass and fenestration expert, Mr. Stephen E. Howes, evaluated different hypothetical alternatives for replicating the horizontal banding. Mr. Howes's expert testimony demonstrates that each of the alternatives is unsafe or inviable for numerous reasons, among them, the following:

1. **Frosting**. Frosting a horizontal band on the tempered glass panels would "completely change the concept of tempered glass" and would prevent the glass from shattering safely upon impact as intended. *App., Ex. J, p. 25.* What is "important is the safety and integrity of the product itself, and by [frosting the glass] it will not work, and you're now putting the glass under even more problems." *Id.*

2. **Sandblasting**. Sandblasting a horizontal band on the tempered glass panels would be useless, as the sandblasted band "will pick up every bit of dirt and it wouldn't look very nice after a couple of weeks, even fingerprints would show up on it." *App., Ex. J, pp. 33-34.* The design effect "won't last very long," making it a wasted effort. *Id.* The DRB Chairman himself acknowledged as much. *Id.* (Mr. Bodnar: "I'm not recommending sandblasting[.]").

3. **Attaching a Metal Plate to the Balcony Slab**. "I wouldn't want to do that. You run your fingers on this . . . it's like having razor blades all around. You have children in the building. No, I wouldn't." *App., Ex. J, p. 36.*

4. **Fritting**. Fritting the exterior of the tempered glass is not possible. "You can't apply anything to tempered glass" and guarantee safety. *App., Ex. J, p. 34.* You could only frit impact glass, and that would require replacing the entire railing system. *Id. pp. 39-40.*

There is no substantial competent evidence refuting this expert testimony. In fact, at the October 2nd rehearing, the Association presented a supplemental report, prepared by a second independent, qualified glass and fenestration expert, which analyzes numerous *additional* hypothetical horizontal banding methods and explains why none are viable, but the DRB yet again refused to heed the expert testimony. *App., Ex. O.*[2]

[2] The City Attorney has objected to the inclusion of the rehearing record as part of this appeal on grounds that denials of rehearing technically are not appealable under the City Code. *Resp. Br., p. 1-2.* The Association includes the rehearing record not because it seeks to appeal the denial of rehearing, but because such evidence was proffered into the record at the October 2nd rehearing and forms part of the procedural posture of the case. The City Commission,

The City Attorney attempts to overcome the dearth of supporting evidence in the DRB's corner by reading Mr. Howes's statements out of context to "prove" that horizontal banding can be replicated without the defective panels. *Resp. Br., p. 7.* But the issue is not whether horizontal banding can be replicated at all, but whether it can be done safely and reasonably and in a way that endures. The answer to all three questions is "no." *This Brief, p. 1-2.*

As Mr. Howes noted in his unrefuted expert testimony, replicating the horizontal band would require replacing the building's entire railing system at a cost of several million dollars. *App., Ex. J, p. 26 & 38.* [3] The DRB and the City Attorney would force the Association to go to such unnecessary lengths in the name of advancing a design preference. *Resp. Br., p. 7.* Yet, there is no record evidence that the railing system is defective—only the metal panels have been shown to be dangerous and unsafe. Further, replacing the entire railing system would be an extremely expensive and invasive undertaking, and it would carry significant and prolonged risk of injury, disturbance, and inconvenience to building residents and to neighboring properties. It would be manifestly unreasonable to require the Association to replace an entire system at an extraordinary cost and with added risk simply to remedy a defect that can and should be cured in isolation.[4]

B. The DRB Cannot Abdicate Its Code-Mandated Responsibility to Give Safety "Particular Attention," Even If Other Boards and Officials May Have Concurrent or Related Jurisdiction.

The DRB's design review responsibilities are enumerated in the City Code, and those criteria require that the DRB consider safety very carefully. Specifically, the Design Review Criteria provide:

> **DESIGN REVIEW ENCOMPASSES THE EXAMINATION OF ARCHITECTURAL DRAWINGS** for consistency with the criteria stated below, **WITH REGARD TO** the aesthetics, appearances, **SAFETY**, and function of any new or existing structure and physical attributes of the project in relation to the site, adjacent structures and surrounding community.

Sec. 118-251(a), City Code. (emphasis added).

Not only is the DRB required to consider safety—they must give safety special attention beyond that owed to other factors:

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having the power to remand the case to the DRB for further consideration, must be aware of the full course of the proceedings below to date and of the need for a final resolution.

[3] The Association proffered formal cost estimates to the DRB at the October 2nd rehearing, *App., Ex. O & P,* but the DRB ignored them. *App., Ex. T.*

[4] Among its factual errors, the City Attorney's Response Brief incorrectly states that "ironically," the Association's proposal to remove the defective panels and clean the tempered glass railings would cost the Association $10,400,000. *Resp. Br., p. 7.* That is the cost of the Association's recent renovation project, a portion of which (approximately $16,000) was allocated toward replacing defective metal panels that had delaminated from the balcony railings. *App., Ex. B & Ex. I, AIA Change Order.*

> **PARTICULAR ATTENTION SHALL BE GIVEN TO SAFETY** [and] impact on contiguous and adjacent buildings and lands[.]

Id., subsec. (7) (emphasis added).

In denying the Association's application, the DRB overlooked this express regulatory obligation and focused exclusively on their preference for horizontal banding. *Pet'r. Br., pp. 5-9.* Throughout the hearing, the DRB gave safety only token attention, discarding the Association's unrefuted expert testimony and relying on merely theoretical evidence and conjecture that the banding can be preserved. So superficial was the DRB's consideration of safety that they ignored Mr. Howes's uncontroverted expert testimony in favor of staff's unsupported, non-expert presumptions that "There is no doubt that [horizontal banding] can be accomplished in a code compliant manner." *App., Ex. G, p. 7.*

The City Attorney attempts to absolve the DRB of its transparent failure to carefully consider safety by alleging that the DRB is tasked with reviewing "design elements" rather than "specific mechanics of construction," and that the Unsafe Structures Board and the City's Building Official are available to address the Association's safety concerns. *Resp. Br., pp. 5 & 10.* The City Attorney fundamentally misunderstands the DRB's regulatory obligations.

The DRB has a precise and independent responsibility to give safety "particular attention" in the design review process. *Sec. 118-251(a)(7), City Code.* The DRB cannot abdicate its code-mandated responsibility to consider safety, even if other boards and officials may have concurrent or related jurisdiction. As the Florida Supreme Court held in *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 377 (Fla. 2003), DRB members do not "have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations." The law requires that DRB understand, evaluate, and apply ***all*** of the Design Review Criteria, and that they do so uniformly. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001). As much as they may prefer to prioritize design to the exclusion of all other factors, DRB members cannot outsource safety concerns to others.

Nor can the City Attorney explain away the DRB's omissions by declaring that all safety concerns had been resolved at the time the DRB heard the case. *Resp. Br., p. 6.* The defective panels pose a continuing safety hazard. *App., Ex. J, p. 10.* ("We now have had the experience of 15 years living with this design and it just doesn't work"). They suffer from a design flaw that will persist until the DRB orders their permanent removal. More critically, the risk of grave injury applies just as equally to the panels that are taped to the interior of the railings as it does to those taped to the exterior. That is because tempered glass is designed to "break[] into lots of pieces and fall[] down safely" upon impact, and taping the panels to either side of the glass impairs the glass's natural propensity to shatter safely when struck, increasing the danger of large chunks of glass, with panels attached, tumbling forcefully down the side of the tower "like a guillotine" "until it hits somebody" or it "go[es] straight through a vehicle." *App., Ex. J, pp. 34-36.* "Even birds" can detonate the glass. *Id., p. 37.* So long as the metal panels remain taped to the glass railings, there will be a significant risk of grave injury to the public. *App., Ex. B, p. 1.* (Ms. Ana Salgueiro, the City's Building Official: "The concern is real.").

The DRB's failure to comprehend and apply the express code-mandated safety criteria in its decision-making ignored the essential requirements of law. For that alone, the DRB's Order must be reversed. *Alvey v. City of North Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016) (failure to consider and apply essential provisions of the city code renders a decision void).

C. The City Attorney Has Not Presented Any Substantial Competent Evidence That the DRB's Decision Satisfies the Code's Safety Criteria.

Lacking substantial competent evidence, the City Attorney turns to the non-expert testimony of Victor Diaz to lend credence to the DRB's unsupported presumptions that the building's tempered glass railings can be safely retrofitted to provide a horizontal band. Mr. Diaz is the Association's past president. *App., Ex. J, p. 5.* The record is totally devoid of Mr. Diaz's qualifications to provide expert testimony on glass railing systems—and for good reason: Mr. Diaz is *not* a qualified expert on such matters. Nevertheless, the City Attorney quotes at length from Mr. Diaz's testimony, devoting several pages of text to statements that are not substantial competent evidence and cannot support the DRB's conclusions on matters of design feasibility and safety. *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 710 (Fla. 3d DCA 2000) ("Where technical expertise is required lay opinion testimony is not valid evidence upon which a [quasi-judicial] determination can be based in whole or in part").

The City Attorney's Response Brief likewise relies on a flawed Staff Report as lending support to the DRB's decision to deny the Association's application. The City Attorney is correct that staff recommendations generally are considered substantial competent evidence. *Resp. Br., p. 13.* However, that presumption evaporates when fact becomes fiction. *First Baptist Church v. Miami-Dade Cty.*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000) ("flawed," "erroneous," or "invalid" staff conclusions "d[o] not constitute competent evidence.").

The Staff Report advances an unsupported theory that the defective panels can be reintroduced safely, and it recommends that the Association adhere the defective metal panels to the balcony railings with "an epoxy adhesive," a recommendation that is wholly unsafe and directly contrary to all evidence supplied by experts competent to testify, and one which the DRB itself rejected. *App., Ex. G, pp. 7 & 35.* (Mr. Bodnar, DRB Chairman: "We all agree the metal is a bad solution.").

City staff are not experts on balcony railing systems nor on the glass and engineering systems that railings require. Their loose presumptions on the topic carry no weight. *Pollard v. Palm Beach County*, 560 So. 2d 1358 (Fla. 4th DCA 1990) (opinions unsubstantiated by competent facts are not evidence). *Div. of Admin. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981) ("[n]o weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning"). The City could have hired their own glass expert if they felt that a second opinion was needed, but they chose not to. Staff's "speculative" and "merely theoretical evidence [and] hypothetical possibilities" are legally insufficient and do not refute Mr. Howes's qualified testimony. *Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996); *see also Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1995) (evidence is substantially competent only if it is "fact-based.").

More importantly, the Staff Report provides the clearest recitation yet of the City's failure to consider safety. In it, staff concludes that that Design Review Criterion seven, which mandates that the DRB give "particular attention" to safety, is "**Not Applicable**" to the Association's application:

7. The design and layout of the proposed site plan, as well as all new and existing buildings shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on contiguous and adjacent Buildings and lands, pedestrian sight lines and view corridors.
Not Applicable

App., Ex. G, p. 3. This key excerpt encapsulates the crux of this appeal: safety *is* applicable, and the DRB failed to give it the "particular attention" it is owed.

CONCLUSION

The DRB may prefer that the South Tower incorporate horizontal elements, but their reliance on Mr. Diaz's non-expert testimony and on a flawed Staff Report is misplaced, their conclusions are not supported by substantial competent evidence, and their review failed to observe the essential requirements of law by abdicating their regulatory responsibility to give safety "particular attention."

Since no competing evidence was ever introduced to refute the Association's expert testimony that there is no safe and effective way of retrofitting the building's existing balcony railings to preserve the faint horizontal band the defective panels evoke from afar, the Association's application must be approved.

For these reasons, the Association respectfully requests that the City Commission reverse the DRB's Order and approve the Association's application for design approval.

Respectfully Submitted,

AKERMAN LLP

By: */s/ Neisen O. Kasdin*

NEISEN O. KASDIN
Florida Bar No. 302783
Primary Email: neisen.kasdin@akerman.com
Secondary Email: diana.perez-gata@akerman.com

JONI ARMSTRONG COFFEY
Florida Bar No. 281646
Primary Email: joni.armstrong.coffey@akerman.com
Secondary Email: maria.y.gonzalez@akerman.com

KRISTOFER D. MACHADO
Florida Bar No. 102731
Primary Email: kristofer.machado@akerman.com
Secondary Email: blislainey.pascual@akerman.com

98 SE 7th Street, Suite 1100
Miami, Florida 33131
Phone: 305.374.5600
Fax: 305.374.5095

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the individuals listed below by e-mail generated this 5th day of December 2018.

Raul J. Aguila, City Attorney
Eve A. Boutsis, Chief Deputy City Attorney
City Attorney's Office
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
RaulAguila@miamibeachfl.gov
EveBoutsis@miamibeachfl.gov
Counsel for Respondent,
City of Miami Beach
Design Review Board

Rafael E. Granado, City Clerk
City Clerk's Office
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
RafaelGranado@miamibeachfl.gov

By: */s/ Neisen O. Kasdin*
Neisen O. Kasdin